

Staff Summary Report

Council Meeting Date: 09/09/04

Agenda Item Number: _____

SUBJECT: This is the introduction and **first** public hearing to authorize the Mayor to execute the Real Estate Purchase Agreement for Lot 1 at the Boardwalk Development Project at Tempe Town Lake between the City of Tempe and Playa Del Norte, LLC. The **second** public hearing is set for September 16, 2004.

DOCUMENT NAME: 20040909dsca01 **RIO SALADO MASTER PLAN (0112-07-03)** Ordinance No. 2004.39.

SUPPORTING DOCS: No.

COMMENTS: The attached Real Estate Purchase Agreement for Lot 1 at the Boardwalk Development conforms to the required terms of the Restated Development and Disposition Agreement (DDA), dated August 21, 2003 (C2001-206C), between the City of Tempe and Playa Del Norte, LLC. Lot 1 contains approximately 700 square feet of City property and is planned to be a restaurant.

PREPARED BY: CHRIS ANARADIAN, RIO SALADO MANAGER (x2204)

REVIEWED BY: JAN SCHAEFER, ECONOMIC DEVELOPMENT DEPT. MANAGER (x8036)

LEGAL REVIEW BY: MARLENE PONTRELLI, CITY ATTORNEY (X8120)

FISCAL NOTE: The purchase price of \$3,669.96 represents a cost of \$4.67 per square foot of 771 square feet of City Property. These costs are in keeping with the terms of the DDA, which set the cost of acquisition of the property at the City's price of acquisitions within the project area. The development of Lot 1 will result in a payments to the City attributable to the property, including town lake capital costs, ongoing annual town lake operational and maintenance expenses and part of the costs associated with the construction of the extension of Miller Road, a City street.

RECOMMENDATION: Adoption of Ordinance No. 2004.39.

ADDITIONAL INFO: None.

ORDINANCE NO. 2004.39

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE THE REAL ESTATE PURCHASE AGREEMENT FOR LOT 1 OF THE BOARDWALK DEVELOPMENT PROJECT AT TEMPE TOWN LAKE BETWEEN THE CITY AND PLAYA DEL NORTE, LLC.

WHEREAS, the City ("Seller") and Playa Del Norte, LLC ("Buyer") have entered into a Restated Development and Disposition Agreement, dated August 21, 2003 (C2001-206C), as recorded September 23, 2003, as Document No. 2003-1331774, records of Maricopa County, Arizona ("Development Agreement"), relating to the development of certain real property known as the Rio Salado Boardwalk Development Project ("Project") lying north of the Salt River and adjacent to the east and west sides of Rural Road in Tempe, Maricopa County, Arizona.

WHEREAS, in the Development Agreement, Buyer has the right to acquire from Seller certain real property owned by Seller and located within the Project.

WHEREAS, Seller is the owner of certain real property (Lot 1) located in the Project, together with all improvements located on the real property, and all rights appurtenant and pertaining to the real property, including but not limited to all water rights, oil, gas and other mineral rights and adjacent rights-of-way (collectively, the "City Property").

WHEREAS, Seller desires to sell the City Property to Buyer, and Buyer desires to purchase the City Property from Seller on the terms and conditions contained in the Real Estate Purchase Agreement.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPE, MARICOPA COUNTY, ARIZONA, as follows:

Section 1. That the City of Tempe hereby approves the Real Estate Purchase Agreement for Lot 1 of the Boardwalk Development Project at Tempe Town Lake between the City and Playa Del Norte, LLC on file with the City Clerk's Office.

Section 2. That the Mayor is hereby authorized to execute any documents necessary to carry out the provisions of this Ordinance.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this ____ day of _____, 2004.

MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

REAL ESTATE PURCHASE AGREEMENT

No. _____

THIS AGREEMENT is made and entered into this ____ day of September, 2004, by and between the CITY OF TEMPE, an Arizona municipal corporation (“**Seller**”), and PLAYA DEL NORTE, L.L.C., an Arizona limited liability company (“**Buyer**”).

I. RECITALS

- 1.1 Seller and Buyer have entered into that certain Restated Development and Disposition Agreement, dated August 21, 2003 (C2001-206C), as recorded September 23, 2003, as Document No. 2003-1331774, records of Maricopa County, Arizona (“**Development Agreement**”), relating to the development of certain real property known as the Rio Salado Boardwalk Development Project (“**Project**”) lying north of the Salt River and adjacent to the east and west sides of Rural Road in Tempe, Maricopa County, Arizona.
- 1.2 In the Development Agreement, Buyer has the right to acquire from Seller certain real property owned by Seller and located within the Project.
- 1.3 Seller is the owner of certain real property (Lot 1) located in the Project, more particularly described in *Exhibit “A”* attached hereto and by this reference incorporated herein, together with all improvements located on the real property, and all rights appurtenant and pertaining to the real property, including but not limited to all water rights, oil, gas and other mineral rights and adjacent rights-of-way (collectively, the “**City Property**”).
- 1.4 Seller desires to sell the City Property to Buyer, and Buyer desires to purchase the City Property from Seller on the terms and conditions contained herein.

II. TERMS AND CONDITIONS

NOW, THEREFORE, for and in consideration of the mutual promises, covenants, conditions and agreements contained herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto, intending to be legally bound, covenant and agree as follows:

- 2.1 Sale of Real Property. Seller hereby agrees to sell the City Property to Buyer, and Buyer agrees to purchase the City Property from Seller on the terms and conditions contained in this Agreement.
- 2.2 Purchase Price. The purchase price (“**Purchase Price**”) for the Real Property shall be the sum of Three Thousand Six Hundred Sixty-Nine and 96/100 Dollars (\$3,669.96), which Purchase Price has been determined by multiplying the square footage of the City Property, in the amount of 771 square feet by \$4.76 per square foot. Provided Buyer is not in default under the Development Agreement at Closing (as hereinafter defined), Seller shall credit a portion of the amount previously advanced by Buyer to Seller under the Development Agreement against the entirety of the Purchase Price for the City Property.
- 2.3 Escrow Agent. Upon execution of this Agreement, Seller and Buyer shall open an escrow (“**Escrow**”) with LandAmerica Lawyers Title (Judy A. Sorensen, Escrow Agent), 2425 E. Camelback Road, Suite 700, Phoenix, Arizona 85016 (“**Escrow Agent**”). This Agreement shall serve as escrow instructions for Escrow Agent, and Seller and Buyer agree to cooperate with Escrow Agent to execute any and all other documents and instruments reasonably deemed necessary by the Escrow Agent to close the transaction contemplated by this Agreement. In the event of any conflict between this Agreement and any other documents or instruments executed by Seller and Buyer, this Agreement shall govern and control. The date of delivery of one (1) fully executed copy of this Agreement to Escrow Agent shall be referred to herein as the “**Delivery Date**”. Escrow Agent shall advise Seller and Buyer in writing of the Delivery Date.
- 2.4 Inspection. Seller grants to Buyer a license to go upon the City Property at any time after the Delivery Date to inspect the City Property. Buyer agrees to indemnify and hold Seller and the City Property harmless from any and all claims, damages, actions, causes of action, liens and suits, including reasonable attorneys’ fees and court costs, in any way relating to or arising from the activities of Buyer or its agents, respecting the inspection rights granted hereunder.
- 2.5 Closing. The Escrow established hereby shall close (“**Closing**”) on or before one hundred eighty (180) days following the Delivery Date.
- 2.6 Closing Costs. In connection with the Closing of the transaction contemplated by this Agreement, Seller and Buyer shall each pay one-half (1/2) of all escrow fees. All recording costs and other costs, if any, shall be paid by Seller. All real estate taxes and assessments shall be prorated as of the date of Closing based upon the latest available tax information. Seller and Buyer shall bear the costs of its own legal counsel.
- 2.7 Title Policy. Seller shall provide, at its cost and expense, a standard coverage title insurance policy (“**Policy**”) effective as of Closing, in the amount of the Purchase Price of the City Property, naming Buyer as the insured. Buyer shall have the

option to obtain, at its own cost and expense, an extended coverage title insurance policy, with any requirements for such extended coverage policy, including but not limited to endorsements, to be the responsibility of Buyer, provided, however, that such election shall not postpone or delay the Closing.

2.8 Conveyance. Seller shall convey to Buyer title to the City Property by Special Warranty Deed, the form of which is attached hereto as **Exhibit “B”** and by this reference incorporated herein (“**Deed**”), subject to all liens and encumbrances of record. Effective on the date of Closing, title to the City Property shall pass from Seller to Buyer.

2.9 Buyer’s Representations. Buyer covenants, represents and warrants the following to Seller, which covenants, representations and warranties shall be continuing covenants, representations and warranties, shall survive the Closing for a period of one (1) year and shall be true and accurate as of the date of Closing:

A. Except as otherwise set forth in this Agreement, Seller has not made and does not make any warranty or representation as to the physical condition or any other matter or thing affecting or relating to the City Property. Buyer has the sole responsible for determining the existence or the non-existence of any fact material to Buyer’s decision to purchase the City Property. Buyer expressly acknowledges that, except as otherwise set forth in this Agreement, Buyer is acquiring the City Property “as-is” and “where-is”, and acknowledges that, except as otherwise provided in this Agreement, neither Seller or any person acting on Seller’s behalf has made any representations or warranties whatsoever pertaining to such matters.

B. The City Property is within the 65 DNL noise exposure contour for the Phoenix Sky Harbor International Airport as defined in the 2000 Federal Aviation Regulation (F.A.R.) Part 150 Noise Compatibility Study.

2.10 Section 1445 Affidavit. Seller shall deliver to Buyer, at Closing, an affidavit stating Seller’s United States taxpayer identification number and that Seller is not a foreign person in accordance with Internal Revenue Code Section 1445, the form of which is attached hereto as **Exhibit “C”** and by this reference incorporated herein (“**Non-Foreign Affidavit**”).

2.11 Conditions Precedent of Seller. The obligations of Seller to close is subject to the satisfaction (or, at its option, waiver) prior to Closing of each of the following conditions precedent:

A. Delivery by Buyer of Buyer’s share of the closing costs;

B. Full performance by Buyer of all obligations of Buyer under the Development Agreement;

- C. Full performance by Buyer of all obligations of Buyer under this Agreement;
 - D. The execution by Buyer of such documents as may be reasonably requested by Escrow Agent to consummate the transaction contemplated by this Agreement.
- 2.12 Conditions Precedent of Buyer. The obligations of Buyer to close is subject to the satisfaction (or, at its option, waiver) prior to Closing of each of the following conditions precedent:
- A. Delivery by Seller of Seller's share of the closing costs;
 - B. Delivery by Seller of the Deed;
 - C. Delivery by Seller of the Non-Foreign Affidavit;
 - D. Full performance by Seller of all obligations of Seller under this Agreement; and
 - E. The execution by Seller of such other documents as may be reasonably requested by Escrow Agent to consummate the transaction contemplated by this Agreement.
- 2.13 Diligence. Buyer and Seller shall make commercially reasonable efforts to satisfy any and all conditions to be satisfied by either of them according to the terms of this Agreement.
- 2.14 Time. Time is of the essence of this Agreement and Buyer and Seller hereby agree to perform each and every obligation hereunder in a prompt and timely manner.
- 2.15 Notice. Any and all notices under this Agreement shall be given either by personal delivery, facsimile transmission, overnight courier or by deposit in the United States mail, first class, postage prepaid, certified or registered, return receipt requested, addressed to the parties at the following addresses, or at such other address as the parties shall advise the other in accordance with the foregoing:

Seller: City of Tempe
21 E. Sixth Street, Suite 201
Tempe, Arizona 85281
Attn: City Attorney
Telephone: (480) 350-8227
Fax: (480) 350-8645

Buyer: Playa Del Norte, L.L.C.

502 S. College, Suite 303
Tempe, Arizona 85281
Attn: Bradley D. Wilde, Manager
Telephone: (480) 968-4600
Fax: (480) 449-9059

With a copy to: Gary A. Drummond, Esq.
Sallquist & Drummond, P.C.
2525 E. Arizona Biltmore Circle
Suite 117
Phoenix, Arizona 85016
Telephone: (602) 224-9222
Fax: (602) 224-9366

Such notices shall be deemed to be received upon actual receipt, if delivered personally; upon confirmation of transmission, if sent by facsimile; the next business day, if delivered by courier; or two (2) business days following deposit in the mail, if delivered by mail.

- 2.16 Attorneys' Fees. In the event it becomes necessary for either Buyer or Seller to employ legal counsel or to bring an action at law or other proceeding to enforce any of the terms, covenants or conditions of this Agreement, the prevailing party in any such action or proceeding shall be entitled to recover its costs and expenses incurred in such action from the other party.
- 2.17 Assignment. Buyer shall have the right to assign its rights under this Agreement to a Builder/User without the prior written consent of Seller provided such Builder/User assumes in writing the obligations of Buyer hereunder.
- 2.18 Entire Agreement. This Agreement and the Development Agreement contain the entire agreement of the parties hereto with respect to the matters set forth herein, and supersedes all prior arrangements and understandings between the parties, and no other agreement, statement or promise made by either party hereto which is not contained herein or the Development Agreement shall be binding or valid.
- 2.19 Amendment. This Agreement may only be amended by written document signed by each of the parties hereto.
- 2.20 Additional Documents. Each party will, whenever and as often as it shall be requested by the other party, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such further instruments and documents, including escrow instructions, as may be reasonably necessary in order to complete the sale, conveyance and transfer herein provided and to do any and all other acts and to execute, acknowledge and deliver any and all documents as may be reasonably requested in order to carry out the intent and purpose of this Agreement.

- 2.21 Execution. This Agreement shall be executed simultaneously or in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.
- 2.22 Successors. This Agreement shall be binding upon and inure to the benefit of the successors in interest and assigns of the parties hereto.
- 2.23 Applicable Law. This Agreement shall be construed and interpreted under, and governed and enforced according to the laws of the State of Arizona.
- 2.24 Commission Indemnification. Buyer and Seller represent each to the other that they have not dealt with any real estate broker or agent in connection with the transaction which is the subject matter of this Agreement and each agrees to indemnify and hold harmless the other from and on account of any claims, demands, costs and expenses including, but not limited to, reasonable attorneys' fees which may be asserted against, suffered or incurred by the indemnitee on account of the action or inaction of the indemnitor.
- 2.25 Seller's Remedies. In the event the purchase transaction contemplated by this Agreement is not consummated solely as a result of Buyer's default under the provisions of this Agreement, Seller's sole and exclusive remedy shall be to terminate this Agreement, and on such termination the parties will be discharged from any further obligations and liabilities hereunder.
- 2.26 Buyer's Remedies. In the event the purchase transaction contemplated by this Agreement is not consummated solely as a result of Seller's default under the provisions of this Agreement, Buyer shall have the right to: (i) terminate this Agreement in which event the parties will be discharged from any further obligations and liabilities hereunder; (ii) waive Seller's default and consummate the purchase transaction contemplated by this Agreement in accordance with the terms and conditions contained herein; or (iii) maintain an action for specific performance.
- 2.27 Tax Reporting. Escrow Agent shall file with the Internal Revenue Service all necessary information, reports and returns regarding the transaction contemplated by this Agreement in accordance with Internal Revenue Code Section 6045(a) and the regulations promulgated thereunder. Escrow Agent agrees to indemnify and hold Seller and Buyer harmless from any and all loss, cost, expense and liability arising out of or in connection with Escrow Agent's failure to file the information described herein.
- 2.28 Time of Performance. If the date for performance of any obligation or the occurrence of any event hereunder or the last day of any time period provided for herein shall fall on a Saturday, Sunday or legal holiday, then such date shall be

replaced by the first day thereafter which is not a Saturday, Sunday or legal holiday.

IN WITNESS WHEREOF, Buyer and Seller have executed this Agreement on the day and year first set forth above.

SELLER:

CITY OF TEMPE, an Arizona municipal corporation

By: _____

Its: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

ACKNOWLEDGED, APPROVED AND ACCEPTED:
LANDAMERICA LAWYERS TITLE

By _____

Its _____

Date _____

BUYER:

PLAYA DEL NORTE, L.L.C., an Arizona limited liability company

By: _____
Bradley D. Wilde

Its: Manager

EXHIBIT “A”

Real Property

Lot 1, PLAYA DEL NORTE, according to Book 685 of Maps, page 32, records of Maricopa County, Arizona

EXHIBIT "B"

WHEN RECORDED, RETURN TO:

City of Tempe
31 E. Fifth Street
Tempe, AZ 85281
Attn: City Clerk

EXEMPT from the
requirement for an
Affidavit of Property Value per
A.R.S. § 11-1134A3

SPECIAL WARRANTY DEED

For good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged, the undersigned, **CITY OF TEMPE**, an Arizona municipal corporation ("**Grantor**") does hereby convey to _____ all right, title and interest of Grantor in, to and under that certain real property described on Exhibit A attached hereto (the "**Property**"). The right, title and interest of Grantor in, to and under the Property was acquired by Grantor pursuant to Document No. 99-0796056, records of Maricopa County, Arizona.

See Exhibit "A" attached hereto and by this reference incorporated herein.

Subject to taxes and assessments, reservations any and all easements, rights-of-way, covenants, conditions, restrictions, liens and encumbrances of record or that would be shown by an accurate survey, Grantor does warrant and agree to defend the title against its acts and none other.

Dated _____, 2004.

CITY OF TEMPE, an Arizona municipal
corporation

By _____
Its _____

ATTEST:

By _____
City Clerk

APPROVED AS TO FORM:

By _____
City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, 2004, by _____ the _____ of the **CITY OF TEMPE**, an Arizona municipal corporation, for and on behalf of said City.

Notary Public

My Commission Expires:

EXHIBIT "C"
NON-FOREIGN AFFIDAVIT

Section 1445(e) of the United States Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform _____ ("Transferee"), that withholding of tax is not required upon the disposition of a U.S. real property interest by CITY OF TEMPE, an Arizona municipal corporation ("Seller"), the undersigned hereby certifies the following:

1. Seller is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Seller's U.S. employer identification number is: _____; and
3. Seller's office address is:
31 E. Fifth Street
Tempe, Arizona 85281

Seller understands that this certification may be disclosed to the Internal Revenue Service by the Transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury, I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of Seller.

Date: _____, 2004

CITY OF TEMPE, an Arizona municipal
corporation

By: _____

Its: _____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, 2004, by _____, _____ of the CITY OF TEMPE, an Arizona municipal corporation.

Notary Public

My Commission Expires:
